PhRMA

July 16, 1999

COMMENTS OF THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA

ON

FDA PROPOSED RULE ON EXPORT NOTIFICATION AND RECORDKEEPING REQUIREMENTS

DOCKET NO. 98N-0583

SUBMITTED TO THE DOCKETS MANAGEMENT BRANCH (HFA-305), FOOD AND DRUG ADMINISTRATION

The Pharmaceutical Research and Manufacturers of America ("PhRMA") represents the country's leading research-based pharmaceutical and biotechnology companies. PhRMA companies are devoted to inventing medicines that allow patients to lead longer, happier, healthier and more productive lives. Investing over $24 billion a year in discovering and developing new treatments, PhRMA companies are leading the way in the search for cures. As pioneers in the discovery and development of new medicines, PhRMA companies are involved in activities with a truly global reach. In particular, PhRMA companies export drugs and biologics to countries around the world, and, therefore, have a keen interest in the rules that apply to exports.

Historically, the United States has had one of the most restrictive drug export policies of any country in the world.[1] In 1986, Congress enacted the Drug Export Amendments Act (Pub. L. No. 99-960) (the "1986 Amendments") and created a three-track system requiring three different levels of approval from FDA for exports, depending on the drug being exported and the regulatory environment in the receiving country. The 1986 Amendments proved inadequate, because they limited exports of unapproved drugs to 21 countries. In addition, the requirement of seeking FDA approval prior to export proved overly burdensome.

Then, in 1996, Congress sought to modernize and liberalize the still restrictive export policies by enacting the FDA Export Reform and Enhancement Act of 1996 (Pub. L. No. 104-132) (the "1996 Amendments"). The 1996 Amendments amended the Federal Food, Drug, and Cosmetic Act ("FDCA") to streamline export requirements and

[1] *See* S. Rep. No. 225, 99th Cong., 1st Ses. 5-6 (1985).

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authorize the export of products not approved in the United States under the circumstances set forth in the new statutory scheme.

FDA's proposed rule seeks to implement the export notification and recordkeeping requirements of the 1996 Amendments[2] in a manner that violates both the letter and the spirit of the 1996 Amendments. The 1996 Amendments provide a comprehensive framework for exports that is essentially self-executing. FDA's proposed rule fundamentally alters this straightforward statutory scheme by creating burdensome new administrative requirements of the very type Congress sought to eliminate. These improper and unauthorized bureaucratic burdens, if allowed to stand, will impede the export of products. FDA must revise its current thinking and either withdraw or substantially revise its proposed rule in order to administer the new law in a manner that is faithful to the statute and Congress's intent. The particular respects in which the proposed rule violates the 1996 Amendments and imposes improper administrative and paperwork burdens are detailed below.

I. Proposed 21 C.F.R. § 1.101(b) -- Recordkeeping Requirements

All products exported under the 1996 Amendments must comply with the general requirements of Section 801(e)(1) of the FDCA. Those general statutory requirements are straightforward. To be exported, a drug product must (1) accord to the specifications of the foreign purchaser; (2) not be in conflict with the laws of the country to which it is intended for export; (3) be labeled on the outside of the shipping package that it is intended for export; and (4) not be sold or offered for sale in domestic commerce. If a company complies with these requirements, the product is not adulterated or misbranded under the FDCA.

The elaborate records that FDA is proposing that a company maintain to demonstrate its compliance with these provisions are not required, and are not authorized, by the statute. Indeed, FDA appears to be contemplating records beyond those traditionally required under Section 801(e). FDA's proposed requirements represent the very type of burdensome bureaucratic procedures that Congress intended to eliminate in reforming the export requirements. Congress intentionally, and quite explicitly, established only minimal recordkeeping requirements for exporters.

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[2] *See* 64 Fed. Reg. 15944 (April 2, 1999).

See, e.g., FDCA § 802(g). FDA is simply not authorized to require companies to keep the kind of records that FDA has suggested, so long as companies comply with the substance of the statute in their actual export activities. Were companies expected to keep such records, the practical effect would be to inhibit exports that are explicitly authorized under the statute.[3]

In particular, under the statute, exporters are not required to maintain detailed records of the product specifications requested by the foreign purchaser related to the product's dosage strength, dosage form, purity, quality, operating parameters, composition, etc. Proposed 1.101(b)(1). Neither are they required to keep records about the details of the product's manufacture related to sterilization processes, compliance with manufacturing standards, etc. Proposed 1.101(b)(1). Independent of the 1996 Amendments, manufacturers are required to maintain certain records as part of their current good manufacturing practices ("cGMPs"). These records should suffice under the 1996 Amendments as well, and the 1996 Amendments do not authorize FDA to impose additional record-keeping requirements.

The requirement that companies obtain a letter, or any other documentary proof, from a foreign government agency, department or body stating that the product has marketing approval from the foreign government and/or does not conflict with that country's laws is also outside the scope of FDA's authority. Proposed 1.101(b)(2). As demonstrated by FDA's "Part 312 program," obtaining confirmatory letters from foreign officials constitutes a significant administrative burden and can cause substantial delay. Further, in some circumstances there will be no express marketing approval from the foreign health authority (*e.g.*, where the foreign authority allows an active ingredient to

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[3] Situations may arise in which companies will have to produce records of their bona fide compliance with Section 801(e)(1). For example, in the *Kanasco* case, the United States Court of Appeals for the Fourth Circuit held that a company cannot defend an FDA seizure by making an unsupported post hoc assertion that otherwise adulterated products were intended for export. *United States v. Kanasco, Ltd.*, 123 F.3d 209 (4th Cir. 1997). However, neither the 1996 Amendments nor the *Kanasco* case prescribe precisely how a manufacturer must establish its intent to export products. It would be reasonable to expect that companies would maintain records establishing their bona fide export activities, but the precise form of those records rests in the first instance within a company's discretion. The proposed rule reflects a much different approach that outlines very detailed recordkeeping requirements not authorized by the statute.

be reworked to bring it into specifications without any formal approval or special documentation). Thus, Congress quite reasonably did not establish a requirement that an exporter obtain a letter or other documentary proof from foreign officials. If the product is in accord with the laws of the destination country, the export is permitted under the statute.

Nowhere does the proposed regulation address how a company should satisfy this requirement for shipments of investigational drugs under section 802(c) of the FDCA. For example, if a protocol discloses that clinical trial material will be sourced out of the United States, it is not clear whether the foreign authority's acceptance of such a protocol would constitute the documentation required under proposed 1.101(b)(2).

For both clinical trial material and other products, there are numerous ways in which a company can ensure that its exports meet the statutory requirement. For example, nowhere did Congress assert or even imply that advice of counsel or other due diligence by a company official would be inadequate to document the exported product's compliance with the destination country's laws, and it is unclear why FDA takes this position now. FDA's proposed establishment of this new requirement, in violation of the statute, creates both a significant administrative and paperwork burden, and risks preventing outright the export of certain products.

Similarly, the statute does not require that firms maintain special records to establish that the exported product is only sold or offered for sale abroad. Proposed 1.101(b)(4). Even if they were required to maintain such records, it remains unclear what FDA means when it states that firms should maintain records concerning "similar products," and what bearing such records would have on whether the exported product is sold in domestic commerce. Consequently, this requirement is deficient in at least two respects: (1) the scope of the required recordkeeping is undefined; and (2) the justification for the recordkeeping is absent.

Finally, FDA's proposed requirement that records be retained for 5 years (proposed 1.101(b)) is excessive. No particular retention period is required by statute, and companies should remain free to follow standard document retention policies such as the GMP requirement that distribution records be retained for one year after the product's expiration date (21 C.F.R. §211.180).

II. Proposed 21 C.F.R. § 1.101(d) -- Notification Requirements

A. General Requirements

The 1996 Amendments require that, for exports of a drug to a listed country under Section 802(b)(1), an exporter provide a "*simple* notification" to FDA identifying the drug when the export "first begins." FDCA § 802(g) (emphasis added). FDA proposes to mandate that exporters identify the country that is to receive the exported product as well (proposed 1.101(d)(1)(iv)), although such a requirement clearly does not exist under the statute. Indeed, FDA itself concedes that "for exports to listed countries under section 802(b)(1) of the act, section 802(g) of the act requires the notification to identify only the drug, biologic, or device being exported and does not expressly require the notification to identify the country to which the drug, biologic, or device is being exported." 64 Fed. Reg. at 15945-46.

FDA attempts to justify this proposed new requirement, notwithstanding the lack of supporting statutory authority, by claiming that such additional information is necessary to facilitate the agency's own enforcement responsibilities. However, the statute is unambiguous. Moreover, FDA's proposal risks significantly complicating what Congress intended to be a simple notification process, for companies would need to send multiple notices as exports continue to additional listed countries.

FDA's proposal also complicates the simple notification process Congress contemplated by failing to specify that notification of an export under section 802 of the FDCA must only be provided when the export "first begins." FDA's proposed rule does not reflect this important limitation, and could be read to create an improper and unauthorized requirement that additional notification be provided following the initial export.

B. Exports in Anticipation of Market Authorization

The 1996 Amendments allow a company to export an unapproved drug to any listed country for additional processing, packing, labeling, or similar operations in order to "fill the pipeline" prior to marketing approval, as long as the shipment complies with the law of the listed country. FDCA § 802(d). For products that are exported under Section 802(d), no notification or reporting requirements exist. Yet the proposed rule provides that firms notify FDA when they export products under this section. FDA itself admits that "[a] literal interpretation of section 802(g) of the act would not require an

exporter to notify FDA when it shipped a product to a listed country in anticipation of market authorization." 64 Fed. Reg. at 15945. FDA cannot justify this requirement by declaring summarily that it would be more "simple and efficient" for exporters to notify FDA when they export a product in anticipation of marketing authorization. The statute is clear, and it does not permit FDA to establish yet another new administrative and paperwork burden, as it has proposed.

III. Recordkeeping Requirements for Products Subject to Section 802(g) -- Proposed 21 C.F.R. § 1.101(e)

The 1996 Amendments require that an exporter must "maintain records of all drugs . . . exported and the countries to which they were exported." FDCA § 802(g). FDA improperly proposes the establishment of additional recordkeeping burdens by providing that exporters maintain records also showing exports by lot or control number and by consignee's name and address. As noted above regarding other new recordkeeping requirements FDA is proposing to create, manufacturers are required to maintain certain records as part of their cGMP obligations; however, the additional detail FDA is proposing here is neither required nor authorized under the 1996 Amendments. As also explained above, FDA's proposed requirement that records be retained for 5 years (proposed 1.101(e)(2)) is excessive. No particular retention period is required by statute, and companies should be free to follow standard document retention policies such as the GMP requirement that distribution records be retained for one year after the product's expiration date (21 C.F.R. §211.180).

IV. FDA's Estimated Annual Reporting and Recordkeeping Burdens

FDA's analysis of the estimated annual reporting and recordkeeping burden of its proposed rule is grossly inaccurate and unrealistic. FDA estimates that the total expenditure of annual employee hours associated with the rule is only 2,659 hours, which translates into approximately 1.5 full time equivalent employees (FTEs). This extremely low estimate simply does not account for many of the basic tasks companies would have to undertake to comply with the proposed rule.

For example, companies would have to maintain detailed records on the product specifications of foreign purchasers, including potentially records on release testing and other related activities. These records might be in a foreign language, and translation would be required to compile and maintain appropriate records domestically. In addition, presumably all of the records and reports required by the proposed rule would

be subject to FDA audit, and additional inspectional time and resources would be required for a company to assist inspectors and answer FDA questions and requests for information.

When all of these tasks are properly accounted for, it becomes clear that FDA's estimate that only 1.5 FTE will be required across all pharmaceutical exporters to manage the requirements associated the proposed rule is drastically understated. Indeed, one PhRMA company estimates that it expended 160 employee hours of regulatory time and 80 person hours of legal time alone to obtain documentation necessary to export product for a single multi-center clinical trial in Latin America and Eastern Europe.

It is difficult to provide an accurate estimate of the actual burdens FDA's proposed rule would impose, because so many of the requirements of the proposed rule are open-ended. For example, the proposed rule states that required records shall "include, but are not limited to" the particular records enumerated. Proposed 1.101(e). Nevertheless, even if these open-ended requirements are appropriately defined and limited, some individual PhRMA companies estimate that they will need to add 2.5 additional FTEs annually themselves to comply with the proposed rule. These additional FTEs are directly related to the recordkeeping and reporting burdens FDA proposes to add to the simple notification scheme contemplated by the 1996 Amendments. Such company-specific estimates obviously dwarf FDA's unrealistic assessment that only 1½ additional FTE will be needed in total industry-wide.

FDA's analysis of the impact of the proposed rule also fails to take into account the expenditures in computer equipment and capabilities that companies will have to make. Both programming and capital investment will be required in domestic and international locations for companies to upgrade computers so that they can track all of the transactions and information needed to meet the recordkeeping and reporting obligations FDA has proposed. Some PhRMA companies estimate that they will be required to spend $50-100,000 in capital costs alone to upgrade their existing computer systems in order to comply with the requirements of the proposed rule. None of these types of expenditures appear to have been included in FDA's evaluation of its proposed rule.

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The 1996 Amendments modernize and streamline the United States' chronically anachronistic and restrictive export laws. FDA's proposed rule re-establishes the very bureaucratic and prohibitive requirements that Congress expressly intended to eliminate. FDA's proposed rule must be withdrawn or substantially revised in order to eliminate this backsliding and bring FDA's implementation in line with the letter and the spirit of the 1996 Amendments. Unless such changes are made, many companies will be placed in the unfortunate position of having to relocate manufacturing functions overseas or compete at a significant disadvantage against foreign companies who are able to export products and clinical trial supplies without the same burdens and restrictions imposed on U.S.-based companies.

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